IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LINDA BEAL, Appellant, v. PAMELA SHOTWELL and JOHN DOE SHOTWELL and the marital community composed thereof, DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF THE STATE OF WASHINGTON, a duly authorized public agency, Respondents.	)	No. 56314-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 31, 2006

DWYER, J. — Linda Beal appeals a trial court's decision granting summary judgment in favor of the Department of Social and Health Services and Pamela Marker,[1] dismissing her claims for employment discrimination, retaliation, wrongful termination in violation of public policy, negligent supervision, and negligent infliction of emotional distress. Beal's employment discrimination claim was properly dismissed because she did not establish a prima facie case. Her retaliation and wrongful termination claims were properly dismissed because she failed to produce evidence from which a rational trier of fact could conclude that the respondents' stated reasons for their adverse employment actions toward her were a pretext for unlawful, retaliatory motives.

[1] Formerly known as Pamela Shotwell.

Finally, because Beal did not allege legal bases to maintain separate claims for negligent supervision or negligent infliction of emotional distress, those claims were also properly dismissed. We affirm.

FACTS

In 1993, Linda Beal began working as a program manager in Region 3 of the Juvenile Rehabilitation Administration (JRA), a subdivision of the Department of Social and Health Services (DSHS). Pamela Marker was the Regional Administrator and Beal's direct supervisor. Marker reported to the Director of JRA Community Programs; that was Robin Cummings until 2002, and Pleas Green thereafter. Doug Kopp was an Assistant Regional Administrator.

In June 1997, Beal complained to Marker that Kopp had been rude to her during a meeting. Beal also complained in July 1997 that Kopp's attendance at a meeting she held with her staff created a "hostile work environment."[2] Marker did not agree with Beal's complaints. Beal then filed two grievances complaining that Kopp had infringed on her job duties and acted aggressively.

In May 1998, Kopp transferred to a different DSHS office. He was replaced by Michael Tyers.

In 1999, Marker denied Beal's request for leave without pay. In response, Beal accused Marker of retaliating for the two-year old disputes involving Kopp.

In mid-2001, Marker evaluated Beal's performance. Marker noted several

[2] Clerk's Papers (CP) at 750.

areas of positive performance and indicated the need for improvement in other areas. Beal had strong objections to her evaluation and insisted that specific accomplishments should be added to it. Beal, Marker, and Tyers met in November, 2001 to discuss Beal's complaints about the evaluation. At that meeting, Beal stated that she perceived the negative aspects of the evaluation as retaliation for the complaints she made about Kopp four years earlier.[3]

In January 2002, Marker's supervisor, Robin Cummings, found Beal guilty of misconduct based upon theft of time and falsifying timesheets. These charges stemmed from an incident on November 15, 2001, when Beal attended two appointments away from her office and did not work the hours she reported. Beal argued that she was "flexing" her time, i.e., would make up for lost time the following day, and that this practice was common at JRA.

On February 21, 2002, Beal filed a tort claim with the Washington State Department of Risk Management. Beal alleged that Kopp created a hostile work environment through displays of "divisive conduct, angry outbursts and undermining behavior toward Ms. Beal and other regional staff."[4] Beal further alleged that Marker dismissed complaints about Kopp because Marker and Kopp were "involved in an intimate relationship."[5] Beal also claimed that Marker's response to Beal's falsification of her timesheet on November 15 evinced

[3] Beal did not properly indicate where this evaluation could be found in the record and we could not locate it. We nonetheless recite her undisputed description of the evaluation and the related meeting.

[4] CP at 790.

[5] Id.

"retaliatory animus,"[6] that Marker had other employees monitor her activities, and that Marker undermined her reputation and effectiveness.

On March 14, 2002, Marker evaluated Beal's performance. Marker's evaluation noted several areas of positive performance, many areas of unsatisfactory performance, and set forth fifteen specific future performance expectations.

Beal alleged that after the March evaluation, Marker treated her unfavorably. She claimed that Marker "excluded" her from an important professional ceremony by failing to adequately inform her about the occasion. She also claimed that Marker denied her request to alter her schedule in order to fulfill an educational goal although similar arrangements were made for other employees. Marker replied that this latter decision was based on staffing concerns and her belief that the class Beal wanted to take would not further the interests of JRA. Beal also claimed that Marker withheld supervisory assistance between mid-2002 and 2003. To substantiate this claim, Beal referred to Marker's statement that, per Beal's request, Marker's communications with Beal during that period were written rather than oral.

On July 19, 2002, Beal filed a complaint in the Snohomish County Superior Court against Marker and DSHS alleging employment discrimination, retaliation, negligent supervision, and negligent infliction of emotional distress.

On October 2, 2002, Marker conducted another performance evaluation

[6] CP at 791.

of Beal to review Beal's progress on the goals that were set in her March evaluation as well as overall areas of strength and concern. Marker specifically addressed each of the goals and generally found Beal's performance deficient. Beal stated in an attachment to the evaluation that it was "filled with inaccuracies and innuendo," but she did not specifically refute the contents of the evaluation.[7]

On January 28, 2003, Beal complained to Marker about an incident at a training session conducted by Kopp, who was then a private contractor. On January 29, Marker initiated an investigation by Kopp's employer. Marker also told Beal that she had a right to ask the state to investigate the complaint, but Beal did not ask for a state investigation.

On February 28, 2003, Beal filed a sexual harassment claim against Tyers on behalf of her subordinates, which was investigated by the State Department of Access and Equal Opportunity and determined to be unfounded.

On June 18, 2003, Marker's supervisor, Pleas Green, suspended Beal for one week without pay for neglect of duty, insubordination, gross misconduct, and willful violation of department rules and regulations. The decision was based on a finding that Beal falsified her timesheet regarding her activities on March 14, 2003. Green also cited Beal's prior timesheet falsification and listed several instances over the prior two years in which Beal had been instructed to improve her communication with management regarding her schedule. Beal appealed the suspension to the Washington State Personnel Appeals Board (PAB),

[7] CP at 228.

arguing that the discipline was retaliatory. The PAB affirmed the suspension.

In January 2004, the only other program manager in Region 3, Crystal Wagner, complained that Beal interfered with her ability to work and negatively affected Region 3. Green retained a consulting firm, ProAct Law Group (ProAct), to look into the work environment in Region 3. ProAct conducted an investigation, interviewed over twenty individuals, including Beal, and submitted its report on May 24, 2004.

On July 12, and August 4, 2004, Beal was deposed. With respect to her complaints about Kopp, Beal stated that he was rude to her as well as other female and male employees. She also stated that she did not know whether Kopp treated her rudely because of her gender.

On August 5, 2004, Green dismissed Beal for neglect of duty, insubordination, gross misconduct, and willful violation of department rules. Green specifically cited several specific forms of misconduct that motivated Beal's dismissal. Green found that Beal made threatening comments to a co-worker, slammed the door of the regional administrator's office and her own office door, asked questions of another employee about the substance of a confidential interview, and made inappropriate comments to a subordinate about the health of another employee. Green also noted that Beal had been repeatedly formally criticized for unprofessional and inappropriate communications and a general lack of cooperation, and that she had been given a letter of reprimand for using profanity and insulting coworkers. Finally, Green

stated that he was particularly troubled by conclusions in the ProAct report specifying that Beal's coworkers said that she contributed to a "'toxic work environment' by regularly displaying an overall disrespect for the Region 3 administrators and by not supporting the [treatment] model and parole standards utilized by JRA."[8]

On November 22, 2004, Beal amended her superior court complaint to include a claim for wrongful termination in violation of public policy.

On May 27, 2005, the trial court granted the defendants' motion for summary judgment, dismissing all of Beal's claims. This appeal followed.

DISCUSSION

I. Standard of Review

On summary judgment we conduct the same inquiry as the trial court. Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 639, 9 P.3d 787 (2000). We affirm summary judgment where the "pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id.

II. Employment Discrimination

Beal first argues that the trial court erred in dismissing her claim for employment discrimination based upon sex.

A plaintiff suffers sex discrimination when he or she is treated less

[8] CP at 711.

favorably than other similarly situated employees because of his or her gender. Shannon v. Pay 'N Save Corp., 104 Wn.2d 722, 709 P.2d 799 (1985). In a discrimination case in which there is no direct evidence or admission of discrimination, a plaintiff can proceed only if facts sufficient to create an inference of discrimination are shown. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 23 P.3d 440 (2001). This required factual showing constitutes the prima facie case. Id.

To create the inference of discrimination required for a prima facie case, a plaintiff must show that he or she belongs to a protected class and was treated less favorably in the terms or conditions of employment than a similarly-situated, non-protected employee who does substantially the same work as the plaintiff. Washington v. Boeing Co., 105 Wn. App. 1, 13, 19 P.3d 1041 (2000). Mere opinions and unsupported, conclusory allegations will not defeat summary judgment. Chen v. State, 86 Wn. App. 183, 191, 937 P.2d 612 (1997); Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wn. App. 137, 141-42, 890 P.2d 1071 (1995).

In her complaint, Beal alleged that Marker treated her "in materially different respect than certain other similarly situated employees, because of [Beal's] gender."[9] Beal also claimed that Marker "engaged in unlawful harassment based on gender when she engaged in an intimate relationship with an employee to whom she extended more favorable treatment" than to Beal and

[9] CP at 886.

that DSHS knew about this yet did nothing to remedy the situation.[10]

We find that Beal's purported showing of sex-based discrimination fails for three reasons. Initially, nothing in the record, aside from Beal's self-serving statements, supports her claim that Marker and Kopp had an "intimate" relationship. In addition, there is no gender component to Beal's allegations. Beal stated that Kopp's rude behavior was directed at both male and female employees and that she did not know whether Kopp's behavior had anything to do with gender. Likewise, none of Marker's alleged "harassment" relates to Beal's gender.

Finally, Beal fails to show that a similarly-situated, non-protected employee was treated more favorably in a term or condition of employment. Beal erroneously argues that Kopp and Tyers, her male colleagues, are proper comparators for this purpose. However, Kopp is not a proper comparator because he and Beal were not similarly situated. Beal made allegations of misconduct against Kopp and we cannot conclude that the resolution of the accusation itself created an inference that the favored party prevailed due to gender.

Likewise, Tyers is not a proper comparator because Beal does not present any evidence that he received more favorable treatment. Her claim that Tyers was treated differently for a timekeeping violation is an unsupported allegation. In fact, the record shows that Tyers did not commit a timekeeping

[10] Id.

violation and that Beal did commit such a violation.

Beal's attempt to present Wagner as a comparator also fails because Wagner, as a woman, is in the same protected class as Beal. Their membership in the same class prevents any inference that a reason for different treatment might be gender.[11]

In sum, because Beal fails to put forth any material fact that could raise an inference of gender discrimination, we find that the trial court properly dismissed this claim.

III. Retaliation

Beal also argues that the trial court erred in dismissing her retaliation claim.

To establish retaliation in violation of RCW 49.60.210,[12] an employee must show three elements: (1) that she engaged in statutorily protected activity; (2) that the employer took "adverse employment action" against her; and (3) that there was a causal link between the statutorily protected activity and the adverse employment action. Washington v. Boeing Co., 105 Wn. App. at 14-15; Delahunty v. Cahoon, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992). To show a

[11] In her appellate brief, Beal appears to also argue that JRA employees Bettye Braid and Dana Phelps are comparators for her discrimination claim. Like Wagner, these female employees are not proper comparators for a female making a gender discrimination complaint. We also reject her suggestion that these women are proper comparators for her employment discrimination claim because she is gay and they are heterosexual. Beal does not articulate a claim of sexual orientation discrimination and nothing in the record suggests any such animus existed at the JRA.

[12] "It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter." RCW 49.60.210(1).

causal connection, the employee must specifically show that the employer's motivation for the discharge was the employee's exercise or intent to exercise the protected rights. Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 68, 821 P.2d 18 (1991).

The plaintiff need not establish that retaliation for protected activity was the sole reason for the adverse employment actions. Instead, she must show only that retaliation was a substantial motivating factor. Allison v. Housing Authority, 118 Wn.2d 79, 96, 821 P.2d 34 (1991). In recognition of the difficulty of proving motive, our courts have allowed an employee to establish the causation element of the prima facie case merely by showing that the employee participated in a protected activity, that the employer had knowledge of the activity, and that the employee suffered an adverse employment action. See Wilmot, 118 Wn.2d at 69; Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 491, 84 P.3d 1231 (2004).

Once a plaintiff has established a prima facie case of retaliation, the defendant employer may rebut the plaintiff's case by demonstrating a legitimate reason for the adverse employment decision. Wilmot, 118 Wn.2d at 70. If the employer successfully demonstrates a legitimate reason, the plaintiff must then show that the employer's proffered reason is merely a pretext. Id.

Beal points to several events in her effort to demonstrate that she was retaliated against after engaging in protected activity.

According to Beal's version of events, her initial protected activity was her

series of complaints against Kopp in 1997 and 1998. When Beal received an unfavorable performance review in November 2001, she claimed that Marker was criticizing her performance because Marker held a grudge arising from Beal's complaints about Kopp. Beal then claims that Marker retaliated against her after the 2001 performance review because Beal suggested that the performance review was unduly negative due to Marker's alleged relationship with Kopp.

We find that these alleged events do not constitute a cognizable basis for a retaliation claim. It is insufficient for Beal to rely only on her unsubstantiated belief that Marker favored Kopp and was thereby motivated to disfavor Beal because Beal complained about Kopp.

Beal also claims that Marker retaliated against her after she filed the tort claim with the Department of Risk Management in February 2002. Marker's alleged retaliation consists of her initiation of a March 14, 2002 performance review, her "exclusion" of Beal from an award ceremony, and her denial of Beal's request to alter her schedule for an educational purpose. Even were we to assume that Beal establishes a prima facie case premised on these assertions, we conclude that she nonetheless fails to provide any factual basis upon which a reasonable fact finder could determine that Marker's stated reasons for taking these actions is pretextual.

The March 2002 performance review addressed Beal's progress on the fifteen goals that were set approximately four months earlier in the November

2001 performance review, and Beal did not specifically refute Marker's detailed criticisms of her performance. The fact that a supervisor timely followed up on legitimate work-related goals is not, on its face, evidence of retaliation.[13] Both the timing and the contents of the review were related to legitimate business concerns.

Similarly, Beal's references to the award ceremony and her request to alter her schedule to accommodate a class are inadequate to raise an inference of retaliation. Even when viewed in the light most favorable to Beal, these were petty slights that do not rise to the level of adverse actions that would dissuade a reasonable worker from making or supporting a charge of discrimination. See Burlington N. & Santa Fe Ry. v. White, 2006 U.S. LEXIS 4895, at *26-27, (U.S. June 22, 2006).[14]

Beal's additional purported grounds for her retaliation claim arise following her filing of this lawsuit in July 2002, and her filing of sexual harassment complaints against Kopp on January 28, 2003 and against Tyers on February 28, 2003. Beal contends that Green's June 2003 suspension of her for falsifying her timesheet and related insubordination was retaliatory. However,

[13] Griffith v. Schnitzer Steel Indus., Inc., 128 Wn. App. 438, 115 P.3d 1065 (2005), illustrates the paradox that a contrary analysis could impose on employers. In Griffith, the employer claimed that it discharged the plaintiff because of his poor performance. The employee then claimed that his employer's lack of documentation regarding his performance was evidence of pretext. Division Two of this court agreed that "an employer's lack of documentation for an employee's poor performance may be circumstantial evidence that the proffered discharge justifications were fabricated post hoc." Griffith, 128 Wn. App. at 450.

[14] In Burlington, the Court explained that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Id. at *27 (citing 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996).

again, Beal fails to provide any basis upon which a reasonable fact finder could determine that Green's stated reasons for this action are pretextual. She does not refute the factual basis for the disciplinary action, nor does she demonstrate that a similarly situated employee committed the same offenses yet received more favorable treatment. Accordingly, Beal fails to demonstrate pretext with respect to these facts.[15]

The final adverse employment action that Beal argues was retaliatory is her August 2004 dismissal. Beal's argument at this juncture is essentially cumulative of the previous retaliation allegations. Beal does not specifically refute Green's numerous grounds for her dismissal. Nor does she refute the findings in the independent report from ProAct, upon which Green relied. Instead, she summarily argues that she was held to different standards than others at JRA because the respondents wanted to retaliate against her for her discrimination and retaliation complaints. This is not convincing. In light of the uncontroverted evidence of Beal's persistent performance problems and Beal's inability to show pretext, we affirm the trial court's decision dismissing Beal's retaliation claim.[16]

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[15] Beal also asserts, on page 31 of her appellate brief, that she was subjected to additional disciplinary actions in December 2003 and March 2004. She does not provide any details about these events, nor does she cite to the record to substantiate this statement. Therefore, we do not consider this claim. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (we are not required to search the record to substantiate factual allegations).

[16] Because Beal's retaliation claim fails, we decline to address DSHS's argument regarding whether her claim is barred by a failure to file an administrative tort claim under RCW 4.92.100.

IV. Wrongful Termination in Violation of Public Policy

Beal also argues that the trial court erred in dismissing her claim for wrongful termination in violation of public policy. We disagree.

A claim for wrongful termination in violation of public policy requires that a plaintiff prove four elements: (1) The existence of a clear public policy (clarity element); (2) that discouraging the conduct would jeopardize the public policy (jeopardy element); (3) that public policy-linked conduct caused the termination (causation element); and (4) that the employer's justification for the termination was pretextual (absence of justification element). Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996). A plaintiff must prove all four elements of the wrongful discharge claim. Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000).

We find that Beal's wrongful termination claim necessarily fails because, as addressed above, she does not set forth evidence from which any reasonable fact finder could conclude that DSHS's proffered reasons for her termination are pretextual.

V. Negligent Supervision

We next address Beal's contention that the trial court erred in dismissing her complaint for negligent supervision. Because no legal basis exists for this separate claim, we affirm the dismissal.

A negligent supervision claim against an employer is permitted when an employer has no respondeat superior liability because its employee acted

outside the scope of employment. Scott v. Blanchet High Sch., 50 Wn. App. 37, 747 P.2d 1124 (1987). However, when an employer does not disclaim liability for the acts of its employee, a negligent supervision claim "collapses into" the direct tort claim against the employer. Niece v. Elmview Group Home, 131 Wn.2d 39, 929 P.2d 420 (1997); Shielee v. Hill, 47 Wn.2d 362, 287 P.2d 479 (1955); Gilliam v. Dep't of Social & Health Servs., 89 Wn. App. 569, 950 P.2d 20 (1998).

DSHS has not alleged that Marker acted outside the scope of her employment or that DSHS is not liable for Marker's acts. Therefore, no legal foundation exists for Beal's negligent supervision claim.[17] It was properly dismissed.

VI. Negligent Infliction of Emotional Distress

Finally, Beal argues that the trial court erred in dismissing her complaint for negligent infliction of emotional distress. We find that the trial court properly dismissed that claim because claims for negligent infliction of emotional distress do not stand on their own as separate causes of action in employment cases. Snyder v. Medical Serv. Corp., 145 Wn.2d 233, 35 P.3d 1158 (2001) (adopting the holding of Bishop v. State, 77 Wn. App. 228, 234-35, 889 P.2d 959 (1995)).

A plaintiff may recover for emotional distress as an element of damages

[17] Beal erroneously cites Wheeler v. Catholic Archdiocese, 65 Wn. App. 552, 829 P.2d 196 (1992), as authority for her argument that a negligent supervision claim is permitted even if the employer has liability for the underlying employee conduct. Wheeler is inapposite. In that case, the Archdiocese did not accept liability for its employee's misconduct. Thus, the negligent supervision claim was properly stated.

on a discrimination claim but cannot maintain a separate claim for emotional distress caused by workplace conflicts. Beal's reliance on Chea v. Men's Wearhouse, Inc., 85 Wn. App. 405, 932 P.2d 1261 (1997), for the contrary position fails because Chea was limited by its facts due to the employer's failure to raise the proper dispositive defense. Snyder, 145 Wn.2d at 245-46. The trial court properly dismissed Beal's negligent infliction of emotional distress claim.

Affirmed.

Dwyer, J.

WE CONCUR:

Ellington, J.

Coleman, J.